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DENNIS ONG CHIN KIAT v. PP

HIGH COURT SABAH & SARAWAK, KUCHING
CELESTINA STUEL GALID JC
[CRIMINAL APPEAL NO: KCH-41-1-4-2017]
23 OCTOBER 2017

B

CRIMINAL LAW: *Penal Code – Section 323 read together with s. 326A – Plea of guilt – Accused sentenced to 12 months' imprisonment by Magistrate's Court – Whether term of imprisonment meted out must be two years – Whether there was failure to inform accused of mandatory imprisonment term of two years – Whether guilty plea sustained – Whether conviction and sentence ought to be set aside – Criminal Procedure Code, ss. 316(b)(i) & 325*

C

CRIMINAL PROCEDURE: *Sentencing – Appeal against – Voluntarily causing hurt to wife – Section 323 read together with s. 326A of the Penal Code – Plea of guilt – Accused sentenced to 12 months' imprisonment by Magistrate's Court – Whether term of imprisonment meted out must be two years – Whether there was failure to inform accused of mandatory imprisonment term of two years – Whether guilty plea sustained – Whether conviction and sentence ought to be set aside – Whether appeal allowed – Criminal Procedure Code, ss. 316(b)(i) & 325*

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The accused was convicted upon his plea of guilty to a charge under s. 323 read with s. 326A of the Penal Code for voluntarily causing hurt to his own wife. The Magistrate's Court had sentenced the accused to 12 months' imprisonment. Dissatisfied with the said sentence, the accused appealed before this court. The issues that arose were (i) what was the maximum imprisonment term punishable under s. 323; (ii) whether there was a failure to inform the accused of the mandatory imprisonment term of two years; (iii) whether the guilty plea could be sustained and (iv) whether the conviction and sentence ought to be set aside.

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Held (allowing appeal; setting aside conviction and sentence):

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(1) In determining the sentence applicable for a charge under s. 323 read with s. 326A of the Penal Code, one must first determine what was the maximum imprisonment term punishable under s. 323. The words used in s. 323 of the Penal Code are 'which may extend to one year', meaning the maximum term is one year. Section 326A uses the phrase 'for a term of twice as long as the maximum term for which he would have been liable on conviction for that offence under the relevant section.' Since the maximum term an accused may be liable under s. 323 of the Penal Code is one year, twice that long is two years. (paras 12 & 13)

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(2) The Magistrate had taken the position that the term of imprisonment of two years was not mandatory. This was further evident in that the Magistrate had only sentenced the accused to 12 months and not 24 months. In addition, the Magistrate read the increase in penalty in s. 326A to apply not only to the imprisonment term but also the fine. Much like in the case of *Mani Maran Athigharee v. PP*, the misconception by the Magistrate as to the applicable sentence resulted in the failure to inform the accused of the mandatory imprisonment term of two years. The nature and consequences of the guilty plea by the accused could not, in the circumstances, have been explained in order for the guilty plea to be sustained. (paras 20 & 22)

(3) In the circumstances and in pursuant of the court's revisionary powers under s. 325 of the Criminal Procedure Code ('CPC') read with s. 316(b)(i) of the CPC, this court allowed the appeal and set aside the conviction and sentence. This court further ordered that the accused be retried before another Magistrate and for that purpose, to be brought before the said Magistrate for mention. (para 23)

Case(s) referred to:
Gabriel v. PP [1991] 1 LNS 44 HC ***(refd)***
Mani Maran Athigharee v. PP [2017] 9 CLJ 232 HC ***(refd)***
Philip Lau Chee Heng v. PP [1988] 2 CLJ 873; [1988] 2 CLJ (Rep) 144 HC ***(refd)***
PP v. Man Ismail [1938] 1 LNS 54 HC ***(refd)***
PP v. Mohd Tajuddin Ahmad [1997] I CLJ Supp 384 HC ***(refd)***
Zulkifli Borhan v. PP [2016] 1 LNS 753 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 173(b), 316(b)(i), 325
Penal Code, ss. 323, 324, 325, 326, 326A, 334, 335

For the appellant - Francis Wee; M/s Wee & Partners
For the respondent - Musli Ab Hamid; DPP

[Editor's note: Appeal from Magistrate's Court, Kuching; Criminal Case No: KCH-83-82-2-2017.]

Reported by Suhainah Wahiduddin

JUDGMENT

Celestina Stuel Galid JC:

[1] The accused was convicted upon his plea of guilty to a charge under s. 323 read with s. 326A of the Penal Code for voluntarily causing hurt to his own wife. The Magistrate's Court had sentenced the accused to 12 months' imprisonment.

[2] It was against the said sentence that the accused had appealed before this court.

[3] It is relevant to fully set out the provisions under which the charge was framed in the present case.

[4] Section 323 of the Penal Code reads as follows:

> Whoever, except in the case provided for by section 334, voluntarily causes hurt, shall be punished with imprisonment for a term, which may extend to one year or with fine which may extend to two thousand ringgit or both.

[5] Section 326A of the Penal Code provides that:

> Whoever, during the subsistence of a valid marriage, causes hurt to his spouse and commits an offence under section 323, 324, 325, 326, 334 or 335 shall be punished with imprisonment for a term of twice as long as the maximum term for which he would have been liable on conviction for that offence under the relevant section.

[6] Section 326A is a fairly new provision in the Penal Code as the insertion was made pursuant to the Penal Code (Amendment) Act 2014 and was published in the *Gazette* on 30 December 2014.

[7] In my research, I came across only two cases, which had dealt with this new provision, *Zulkifli Borhan v. PP* [2016] 1 LNS 753; [2016] 5 MLRH 600 and *Mani Maran Athigharee v. PP* [2017] 9 CLJ 232; [2017] MLRHU 1. However, only *Mani Maran* discussed about the application of s. 326A.

[8] In *Mani Maran*, the accused was charged with an offence under s. 323 read with s. 326A of the Penal Code. He pleaded guilty and was sentenced to 12 months' imprisonment. The accused appealed against the sentence.

[9] Having considered the authorities including the Hansard relevant to the Penal Code (Amendment) Act 2014, the learned Judicial Commissioner in *Mani Maran* came to the conclusion that: (1) the words "shall be punished with imprisonment" in s. 326A meant that imprisonment sentence was mandatory and (2) reading s. 323 with s. 326A, the mandatory term of imprisonment for an offence committed thereunder was two years.

[10] Without the benefit of any other reported cases on s. 326A, I have further read the relevant parts of the Hansard (DR.22.10.2013 at pp. 110-115) on the amendment to include s. 326A to satisfy myself as to the intention of the Parliament with regards to the amendment. These are reproduced below:

> Tuan Gobind Singh Deo [Puchong]: …
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> Kenapa disebut di situ perkataan maximum? Shall be punished with imprisonment for a term of twice as long, not as just the term. What is stated there punishment imprisonment for a term of twice as long as the maximum term for which he would have been liable on conviction. Bukankah ini dengan cukup jelas mengikat tangan mahkamah? Because there is no choice. It is not imprisonment twice as long as the term for which he would have been liable. Kalau sedemikian, then yes.

Whatever it is the court, the original court would has been given, then yes it has twice because it is the term that he would have been liable. Akan tetapi perkataan yang digunakan di situ maximum. Jadi maximum itu adalah maximum yang wujud di bawah seksyen-seksyen tersebut and then of course take this two three different level. Jadi saya hendak minta penjelasan daripada Timbalan Menteri berkenaan dengan isu ini. Terima kasih Timbalan Menteri.

Puan Hajah Nancy binti Shukri:

Terima kasih Yang Berhormat Puchong. Berbalik lagi kepada perkara yang sama. *Sebenarnya ini adalah tujuan dengan hasrat yang baik.* Tujuan kerajaan untuk tidak menggalakkan this fights among the husbands and wives or among the spouses. Jadi ini adalah cara to avoid cases seperti ini jadi menular. Jadi inilah cara yang difikirkan baik. Tidak mahu menjadikan si isteri ataupun spouse dia menjadi punching bag kepada spouse dia. Jadi inilah dimaksimumkan hukumannya.

Tuan Gobind Singh Deo [Puchong]:

Jadi apa yang Timbalan Menteri menyatakan bahawa you confirm now that apa yang dimaksudkan di situ is that, it has to be twice the maximum the sentence. Adakah itu apa Yang Berhormat Menteri mengesahkan dalam Dewan ini?

Puan Hajah Nancy binti Shukri:

Apa yang kita bacakan ini, memang inilah dia. I cannot change what is written in here.

…

Tuan Gobind Singh Deo [Puchong]:

Kalau boleh apa yang dilakukan biasanya adalah di mana kita membenarkan hukuman twice as much as a court would have been given under the section has been convicted under that original section. Jadi kalau maximum for three to six is 20 years and the court's looking at the facts, akan memberi 10 tahun. Kalau di bawah seksyen ini dan will be double of 10 years. *Akan tetapi dengan perkataan maximum di situ, saya hendak pengesahan daripada Menteri. Is this what we are looking at di mana the court does not has the discretion but has to give twice the maximum of the penalty under 326 misalnya. Is that what it is we want to pass in this Dewan?*

Puan Hajah Nancy binti Shukri:

Yang Berhormat Puchong, *memang itulah yang dihasratnya. Itu yang saya tahu inilah yang dihasratnya.* Kalau itu dikatakan tidak membantu, maka sebenarnya hasrat yang baik ialah untuk membantu spouse especially the women. Saya rasa semalam pun saya dengar Yang Berhormat Bukit Gelugor … (emphasis added.)

[11] It was clear from the above excerpts of the Hansard that the learned Judicial Commissioner in *Mani Maran* was not without any basis to come to the conclusion set out above.

[12] In determining the sentence applicable for a charge under s. 323 read with s. 326A of the Penal Code, one must first determine what is the maximum imprisonment term punishable under s. 323. The words used in s. 323 of the Penal Code are "which may extend to one year", meaning, the maximum term is one year.

[13] Section 326A uses the phrase "for a term of twice as long as the maximum term for which he would have been liable on conviction for that offence under the relevant section". Since the maximum term an accused may be liable under s. 323 of the Penal Code, is one year, twice that long is two years.

[14] It is trite law that the words "shall be punished" connote a mandatory meaning – see *Public Prosecutor v. Mohd Tajuddin Ahmad* [1997] 1 CLJ Supp 384, *Gabriel v. PP* [1991] 1 LNS 44; [1992] 1 MLJ 593, *Philip Lau Chee Heng v. PP* [1988] 2 CLJ 873; [1988] 2 CLJ (Rep) 144 and *PP v. Man Ismail* [1938] 1 LNS 54; [1939] 8 MLJ 207.

[15] Taking all these into account what then is the effect of reading s. 323 and s. 326A of the Penal Code?

[16] On this, I would be in agreement with the analysis and conclusion by the learned Judicial Commissioner in *Mani Maran* that the mandatory term of imprisonment is two years. It is instructive to note that s. 326A was further amended pursuant to the Penal Code (Amendment) 2017 which was published in the *Gazette* on 2 June 2017 but as at the date of the decision of this appeal, not yet in force. By this amendment, s. 326A will now read as follows:

> (1) Whoever causes hurt to his spouse or former spouse, a child, an incapacitated adult or other member of the family and commits an offence under section 323, 324, 325, 326, 334 or 335 *shall be punished with imprisonment for a term which may extend to twice of the maximum term for which he would have been liable on conviction for that offence under the relevant section* notwithstanding any other punishment provided for that offence. (emphasis added.)

[17] As shown in the recent amendment, it is no longer mandatory that the imprisonment be twice the maximum term under ss. 323, 324, 325, 326, 334 or 335 of the Penal Code.

[18] However, all that did not settle the matter in the appeal before me.

[19] As stated earlier, the accused had pleaded guilty to the charge. At p. 8 of the record of appeal, the learned Magistrate had asked the accused as follows:

Court: Do you know that pursuant to section 323 of the Penal Code read together with Section 326A Penal Code, the offence is punishable with imprisonment **up to 2 years or fine not more than RM4,000.00 or both**?

Accused: Yes, I understand. (emphasis added.)

[20] From the above, it was obvious that the learned Magistrate had taken the position that the term of imprisonment of two years was not mandatory. This was further evident in that the learned Magistrate had only sentenced the accused 12 months and not 24 months. In addition, the learned Magistrate read the increase in penalty in s. 326A to apply not only to the imprisonment term but also the fine.

[21] Section 173(b) of the Criminal Procedure Code ("CPC") provides that:

> If the accused pleads guilty to the charge, whether as originally framed or as amended, the plea shall be recorded and he may be convicted on it and the Court shall pass sentence according to law:
>
> > Provided that before a plea of guilty is recorded the Court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him.

[22] Much like in the case of *Mani Maran*, I found that the misconception by the learned Magistrate as to the applicable sentence resulted in the failure to inform the accused of the mandatory imprisonment term of two years. The nature and consequences of the guilty plea by the accused could not, in the circumstances, have been explained in order for the guilty plea to be sustained.

[23] In the circumstances and in pursuant of the court's revisionary powers under s. 325 of the Criminal Procedure Code ("CPC") read with s. 316(b)(i) of the CPC, I allowed the appeal and set aside the conviction and sentence. I further ordered that the accused be retried before another Magistrate and for that purpose, to be brought before the said Magistrate for mention.